

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY A. MOORE,

Plaintiff-Appellant,

v

LISETTE A. EGAN, BRIAN OBERLY, PATTY
SCHOECK, YVONNE BROWNLEE, ALICIA
HORVATH and SISTERS OF BON SECOURS
NURSING CARE CENTER,

Defendants-Appellees.

UNPUBLISHED
February 28, 2006

No. 262390
Wayne Circuit Court
LC No. 04-416248-CD

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of dismissal with prejudice of her employment discrimination claims against defendants. Plaintiff essentially argues that her rights were violated when the trial court refused to allow her purported husband, Robert Smith, to represent her because he is not a licensed attorney. We disagree and affirm.

Plaintiff sued defendants *pro se*, claiming that she was unable to afford an attorney, that the Detroit Bar Association referral service was unresponsive, and that a legal aid agency declined to take her case. Plaintiff refused to be deposed by defendants unless Smith was permitted to advise and represent her during the deposition. Her claims were dismissed because she disobeyed a court order which required her to attend her deposition and which barred Smith from being present while she was deposed.

We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). An abuse of discretion exists only "when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.313(D)(1)(a) authorizes a court to order sanctions for a party's failure to appear for her deposition after being served with proper notice. Authorized sanctions specifically include those listed in MCR 2.313(B)(2)(a), (b) and (c). MCR 2.313(D)(1). MCR 2.313(B)(2)(c), in turn, authorizes dismissal of a suit as a sanction for failure to obey an order to provide or permit discovery. *Bass, supra* at 26.

Dismissal is a drastic sanction which is “generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary.” *Bass, supra* at 26. The record should reflect that the trial court carefully considered the circumstances of the case to determine whether dismissal is appropriate. *Id.* To this end, a nonexhaustive list of factors which a court should consider include the following: (1) whether the violation was willful or accidental; (2) the party’s history of refusing to comply with discovery requests; (3) the prejudice to the other party; (4) the degree of compliance by the party with other provisions of the court’s order; (5) attempts by the party to timely cure the defect; and (6) “whether a lesser sanction would better serve the interests of justice.” *Id.* at 26-27, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). For a violation of MCR 2.313 to be willful, it need only be conscious or intentional rather than accidental or involuntary; there need not be wrongful intent. *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987).

Here the trial court did not abuse its discretion when it dismissed plaintiff’s case. Plaintiff willfully refused to attend any of three scheduled depositions. She consistently asserted that she would continue to refuse. Defendants were prejudiced by their inability to gain information about the events which plaintiff alleged constituted wrongful and discriminatory discharge as well as how these events caused her alleged damages. Finally, plaintiff’s consistent refusal likely made other sanctions useless. The trial court made her aware that the case would be dismissed if she did not attend her deposition without Smith’s presence. The court subsequently gave her two opportunities to obtain counsel and to attend the deposition. Moreover, the court appears not to have awarded costs as a sanction because plaintiff did not have the means to pay them.

Finally, there is no merit to plaintiff’s claim that the court abused its discretion when it barred Smith from representing plaintiff at her deposition because he is not an attorney. MCL 600.916(1) prohibits unlicensed persons from the practice of law in Michigan. The purpose of the prohibition is to protect “the public from the danger of unskilled persons practicing law.” *Dressel v Ameribank*, 468 Mich 557, 564; 664 NW2d 151 (2003). In an attempt to define the boundaries of this prohibition, the *Dressel* Court concluded that “a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge.” *Id.* at 569.

Plaintiff explicitly sought Smith’s advice and representation during her deposition. She also specifically refused to be deposed if Smith was merely allowed to be present but not permitted to speak on plaintiff’s behalf. Such assistance certainly requires the use of legal discretion and knowledge. Moreover, regardless of whether Smith was permitted to attend the deposition, plaintiff consistently insisted that he be permitted to represent her in court as well. Such representation would clearly constitute the unauthorized practice of law. Furthermore, Smith’s and plaintiff’s apparent lack of skill in legal matters is apparent from the proceedings in the lower court. Although plaintiff may feel she has little to lose, she was exposed to the danger of costly sanctions that the trial court was kind enough not to impose. Furthermore, the general public is affected by the waste of judicial resources and the costs to defendants which resulted and which would have continued to result from further proceedings in this case.

To this end, we note the substantial unfamiliarity with law or legal proceedings that is evident from plaintiff's filings and statements. She makes unexplained references to the fifth, sixth and fourteenth amendments of the United States Constitution, to the "Uniform Commercial Code 130" and to the "fairness doctrine." There is little in plaintiff's complaint or in the remaining record that appears to substantiate or even properly allege a viable claim. Upon cursory review, plaintiff does not appear to allege the elements of discriminatory discharge nor does she refute that she was an at-will employee. Accordingly, we conclude that the lower court properly considered the circumstances of this case and did not abuse its discretion when it dismissed plaintiff's claim after she consistently refused to proceed without Smith's representation.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens